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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0026-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/23/2021
DEANA WILLIAMSON, CLERK

CHRISTOPHER JAMES HOLDER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County
Trial Cause 416-80782-2013
Appeal No. 05-15-00818-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Christopher Holder.

* The trial judge was Hon. Chris Oldner, Presiding Judge, 416th District Court, Collin County, Texas.

* Appellant was represented in the trial court, the Court of Appeals, and this Court in PD-1269-16 by Steven Miears, 206 East College, Suite 200, Grapevine, Texas 76051. He was also represented in the trial court by Keith Gore, 2301 West Virginia Pkwy, McKinney, TX 75071.

* The State was represented at trial by Assistant District Attorneys Cynthia Walker and Wes Wynne, 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

* Counsel for the State in the Court of Appeals was Assistant District Attorney Libby Lange, 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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v.

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Appeal from Collin County
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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This case is likely this Court's "earliest opportunity" to clarify that the non-constitutional harm standard applies to Article 38.23 error.[1] It should take it. Applying that standard here, the erroneous admission of the CSLI data was harmless.

[1] *Dixon v. State*, 595 S.W.3d 216, 226 (Tex. Crim. App. 2020) (Hervey, J., concurring) (suggesting this Court, at its "earliest opportunity," overrule the part of *Love v. State*, 543 S.W.3d 835, 845 (Tex. Crim. App. 2016), suggesting the opposite).

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

During a capital murder investigation, police used a court order to obtain records from Appellant's cellphone company.[2] Following his indictment,[3] he argued this seizure violated TEX. CONST. art. I, § 9, and moved to suppress any evidence.[4] The trial court denied the motion.[5] Evidence from the seizure was admitted at trial, and Appellant was convicted.[6]

On appeal, he re-urged his claim.[7] The court of appeals overruled it, and this Court granted review on a different issue.[8] After *Carpenter v. United States*,[9] this

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[2] 2 RR 112-16, 133-34; 14 RR 134 (SX 7b) (23 days' worth of cell-site location information (CSLI)).

[3] CR 25.

[4] CR 47-51 (motion), 125-26 (brief in support).

[5] 2 RR 108-53 (hearing); 3 RR 8-13 (hearing continued); CR 399 (ruling).

[6] 7 RR 55-83 (State's CSLI expert for Appellant's records); SX 49-57 (State's documentary exhibits).

[7] App. COA Opening Brief at 62-66.

[8] *Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362, at *13 (Tex. App.—Dallas Aug. 19, 2016) (not designated for publication), *rev'd*, 595 S.W.3d 691 (Tex. Crim. App. 2020).

[9] 138 S. Ct. 2206 (2018).

Court retrospectively granted review and reversed the court of appeals.[10] This Court held that the seizure violated Art. I, § 9 and, consequently, the trial court erred in not suppressing the records under TEX. CODE CRIM. PROC. art. 38.23.[11] On remand to decide harm, the court of appeals held that this Court's decision in *Love*[12] required it to apply the constitutional harm standard, TEX. R. APP. P. 44.2(a).[13] It declared the error harmful under that standard and remanded for a new trial.[14]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion December 15, 2020. No motion for rehearing was filed. This Court granted the State an extension of time to file this petition by February 19, 2021.

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[10] *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020).

[11] *Id.*

[12] 543 S.W.3d at 846.

[13] *Holder v. State*, No. 05-15-00818-CR, 2020 WL 7350627, at *3 (Tex. App.—Dallas Dec. 15, 2020) (not designated for publication).

[14] *Id*. at *7 ("[B]ecause we cannot determine beyond a reasonable doubt that the cell site location information did not contribute to the jury's verdict, the error was not harmless.").

GROUNDS FOR REVIEW

(1) If the error at trial was in admitting evidence under a non-constitutional rule—TEX. CODE CRIM. PROC. art. 38.23—shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?

(2) If the non-constitutional "substantial rights" standard applies, was the error harmless?

ARGUMENT

ISSUE 1

The court of appeals erred to apply a constitutional harm standard because the only error that mattered—one that occurred at trial and that Appellant complained of—was not constitutional. He turned out to be right that collection of his phone records violated TEX. CONST. art. I, § 9. But that Texas constitutional violation does not trigger any harm standard (constitutional or otherwise) because it did not occur at trial. The error was the admission of evidence in violation of Article 38.23.

Not just any violation will do; the harm standard requires error at trial.

Rule of Appellate Procedure 44.2(a) provides:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines

> beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[15]

Like harm under 44.2(b), this test for harm deals only with error that has occurred at trial, usually by the trial court.[16] In a criminal trial, there is no error (or remedy) until evidence is *admitted at trial*, or some other error happens *at trial*. It is not enough that the appellate record reveals a Texas Constitutional violation that occurred in the past (here, when the evidence was obtained by police). What triggers the constitutional harm analysis is whether constitutional error occurred during the trial proceedings. Only such errors could conceivably contribute to the conviction or punishment or be subject to harmless error review.[17]

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[15] TEX. R. APP. P. 44.2(a). This standard incorporates *Chapman v. California*'s harmless-constitutional-error rule. 386 U.S. 18, 24 (1967). The non-constitutional standard's origin is also federal. Notes and Comments, TEX. R. APP. P. 44.2 ("Comment to 1997 change: …Paragraph 44.2(b) is new and is taken from Federal Rule of Criminal Procedure 52(a) without substantive change.").

[16] *Snowden v. State*, 353 S.W.3d 815, 821 (Tex. Crim. App. 2011) ("The *parties* do not ordinarily commit error; the *trial court* does, whenever it acts, or fails to act, over the legitimate objection of a party or it conducts trial proceedings in a manner inconsistent with a constitutional or statutory requirement that is not optional with the parties.").

[17] *See Miles v. State*, 204 S.W.3d 822, 826 (Tex. Crim. App. 2006) (*Chapman*-standard "trial errors" are the "isolated and limited errors which occurred during the presentation of the case to the trier of fact, and which may, therefore, be 'quantitatively assessed' in the context of the entire trial") (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)). Even errors not subject to harmless error review still have to affect trial. *See Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) (comparing structural errors, which affect the framework within which the trial proceeds, to non-structural errors that are "simply an

While collecting the records was not a trial error, admission of the records as evidence was. As explained below, however, this error did not violate the Texas Constitution, only Article 38.23.

The trial error (admitting evidence of the seizure) didn't violate Art. I, § 9.

In *Weeks v. United States*, the Supreme Court held that it violates the Fourth Amendment not only for government actors to conduct an unreasonable search or seizure but also for the trial court to admit evidence of that search or seizure during a criminal trial.[18] The Supreme Court reasoned that the federal constitutional right to be secure against unreasonable searches and seizures was of "no value" if evidence obtained in violation of that right could be admitted into evidence at trial.[19] *Weeks* thus created an exclusionary rule built into the federal constitution.

This Court interpreted the Texas Constitution differently. Six years after *Weeks*, this Court in *Welchek v. State* found no explicit or implicit exclusionary rule in the text of Art. I, § 9 and held that Texas valued the rights of the general public to "present all testimony to develop a criminal case" above an individual defendant's

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error in the trial process itself") (citing *United States v. Marcus*, 560 U.S. 258, 263 (2010) and *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

[18] *See Weeks v. United States*, 232 U.S. 383, 393 (1914).

[19] *Id.*

privacy or property right.[20] Unlike the federal constitution, the Texas Constitution is not violated by admission of the fruits of a search and seizure violation.

In reaction to *Welchek*, the Texas Legislature created a statutory exclusionary rule—Art. 38.23.[21] It provides that "[n]o evidence obtained by an officer… in violation of any provisions of the Constitution… of the State of Texas… shall be admitted in evidence…."[22] But the Legislature could not overrule *Welchek*'s interpretation of the Texas Constitution. The Texas Constitution continues to permit the admission of evidence obtained in violation of Art. I, § 9.[23]

Because of this important difference, the admission of the CSLI evidence at Appellant's trial did not violate the Texas Constitution, only the Texas statutory exclusionary rule. It would have violated the federal exclusionary rule (which is constitutional error), but Appellant did not complain of this. Because the error before the court of appeals was statutory, it ought to have applied the non-constitutional harm standard.[24] *Love* is the reason it did not.

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[20] 247 S.W. 524, 528–29 (Tex. Crim. App. 1922).

[21] *Miles v. State*, 241 S.W.3d 28, 33 (Tex. Crim. App. 2007).

[22] TEX. CODE CRIM. PROC. art. 38.23(a).

[23] *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (majority op.).

[24] *See Hernandez v. State*, 60 S.W.3d 106, 116 (Tex. Crim. App. 2001) (Keller, P.J., dissenting) ("Article 38.23 is a statutory mechanism, not a constitutional one, and any error

This Court should disavow *Love v. State*'s leap to constitutional harm.

As Judge Hervey suggested in her *Dixon* concurrence (joined by Judge Newell and recently retired Judge Keasler), *Love* mistakenly applied the constitutional harm standard to a violation of Article 38.23.[25] *Love* was a death-penalty direct appeal that involved the erroneous admission of text messages in violation of both the Fourth Amendment and Art. I, § 9.[26] This Court stated that a federal good-faith-exception analysis could be avoided because Love also relied on Article 38.23's narrower good-faith exception (which would not apply) and thus the evidence was inadmissible on state grounds.[27] Turning to harm (and without further explanation), the Court stated, "When the error in question is constitutional, an appellate court must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."[28] This was a puzzling leap of logic. If the federal-good-faith exception

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predicated thereon must be analyzed under the standard of harm for non-constitutional errors.").

[25] *Dixon*, 595 S.W.3d at 226 (Hervey, J., concurring to Keller, P.J.'s unanimous opinion).

[26] 543 S.W.3d at 838 (Yeary, J., joined by Johnson, Keasler, Alcala, Richardson, and Newell, JJ.).

[27] *Id*. at 846.

[28] *Id*.

prohibited the admission of evidence, Love would have established federal-exclusionary-rule error, which would have properly been analyzed under Rule 44.2(a). But, as articulated above, if only the statutory exclusionary rule was in play, the Rule 44.2(b) harm standard applied.[29]

Love misled this court of appeals and another it followed.[30] This Court should take the opportunity to correct this error before other courts follow suit.

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[29] This Court was right in that a constitutional violation (both state and federal) occurring at any point triggers both Art. 38.23(a) and the exception to the exclusivity of remedies under the Stored Communication Act. *Love*, 543 S.W.3d at 846 n.8 (citing former TEX. CODE CRIM. PROC. art. 18.21, §§ 12 & 13, now codified at art. 18B.553, which limits remedies for violations of Art. 18.21 to those provided in that chapter "other than a violation that infringes on a right of a party that is guaranteed by a state or federal constitution"). But for purposes of harmless error review, the only violation that matters is an error occurring at trial.

[30] *See Holder*, 2020 WL 7350627, at *3 ("reach[ing] similar conclusion" as *Livingston v. State*, No. 02-19-00288-CR, 2020 WL 6165411, at *9 (Tex. App.—Fort Worth Oct. 22, 2020, no pet.) (mem. op., not designated for publication). *Livingston*, which involved evidence taken during a criminal trespass by a private person, did not even involve a constitutional violation at any point in time, much less during trial. It appears to have concluded, based on *Love* and the *Dixon* concurrence, that Art. 38.23 is constitutional in nature. This would, in effect, overrule *Welchek*. The State won *Livingston* because the court of appeals held the error harmless under the higher standard, and so no State's petition for discretionary review followed.

ISSUE 2

If the non-constitutional standard applies, was the error harmless?

This Court has already remanded the issue of harm to the court of appeals once before. If it decides that the non-constitutional harm standard applies, this Court should conduct the harm analysis the court of appeals ought to have done.[31]

Error was harmless under the non-constitutional harm standard.

Under the non-constitutional harm standard, the introduction of Appellant's CSLI was harmless because it would not have had a substantial effect on the jury.[32] Although the lower court found the CSLI evidence to be harmful under the

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[31] *See Elizondo v. State*, 487 S.W.3d 185, 204 (Tex. Crim. App. 2016) ("harm is always an issue properly before this Court whenever error is discovered.") (quoting *Miller v. State*, 815 S.W.2d 582, 586 n.2 (Tex. Crim. App. 1991)). This Court should go on to determine harm because remand yet again to the court of appeals would waste judicial resources and further prolong an already lengthy appeal. *See Clay v. State*, 240 S.W.3d 895, 906 (Tex. Crim. App. 2007) (determining punishment harm after court of appeals found harm only as to guilt phase); *see also State v. Cortez*, 543 S.W.3d 198, 201 (Tex. Crim. App. 2018) (not wanting to "kick[] the can down the road" when it would involve court of appeals looking at the case a third time). This case was tried in 2015 and first disposed of by the court of appeals in late 2016. Further, the parties briefed non-constitutional harm in the court of appeals and, even though it measured harm against a heightened standard, that court had the opportunity to properly consider the relative significance of the CSLI evidence in the context of the entire trial.

[32] *See* TEX. R. APP. P. 44.2(b); *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018).

constitutional standard, it unfairly dismissed or minimized the other overwhelming evidence incriminating Appellant.[33]

This Court's prior opinion and the record highlight this other evidence:

- Appellant had motive.[34]
    - Tanner had recently kicked Appellant out of his house.[35]
    - When asked about an allegation that Tanner molested the daughter of Casey James (his ex-girlfriend), Appellant expressed strong feelings to police, saying "children shouldn't be molested."[36]
    - Appellant's motive, according to police, was manifested as a crime of passion; Tanner was stabbed twenty times while alive and once post-mortem and suffered blunt-force head trauma.[37]

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[33] *See Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002) ("overwhelming evidence of guilty" is a relevant factor in a non-constitutional harm analysis); *Neal v. State*, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008) ("Assuming without deciding that the trial court erred in admitting the surveillance videotapes or ATM receipts, such error was harmless in light of the overwhelming evidence of guilt").

[34] *Clayton v. State*, 235 S.W.3d 772, 781 (Tex. Crim. App. 2007) (motive is a circumstance indicative of guilt).

[35] 5 RR 12-24.

[36] 7 RR 96-97 (first detective); 8 RR 107 (second detective).

[37] 5 RR 180-82, 190-91 (injuries); 8 RR 108-09 (crime of passion).

- Appellant had opportunity.[38]

    - Appellant knew James and her kids (who shared the house with Tanner) would be out of town the weekend of November 9th through 11th.[39]

    - Appellant was privy to Tanner's habits—he did not use an alarm system or lock his doors and would be compromised by drinking on the weekend.[40]

- By involving Thomas Uselton, Appellant provided an eye-witness to his incriminating post-crime conduct.

    - Appellant enlisted Uselton—a friend of his for a couple of years—to help after he murdered Tanner sometime after 2:35 p.m. on November 10th when Tanner ended a call with his parents.[41]

    - Appellant and Uselton, stocked with bleach and black latex gloves, had Appellant's then-girlfriend drive them to Tanner's house.[42]

    - When Uselton saw Tanner's dead body, Appellant threatened him: "[T]hink about your family, bro. You know what it is if you say anything."[43]

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[38] *See Nisbett v. State*, 552 S.W.3d 244, 265 (Tex. Crim. App. 2018) (opportunity and motive are evidence of guilt); *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012) (same).

[39] 5 RR 108-10, 134-35.

[40] 5 RR 112 (no alarm), 127 (unlocked doors); 8 RR 109-10 (drinking).

[41] 6 RR 230-32 (Tanner's phone records); 8 RR 47-50 (Uselton).

[42] 8 RR 51-53. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (attempts to conceal incriminating evidence is probative of wrongful conduct and a circumstance of guilt).

[43] 8 RR 53. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (threats against a witness evidences a consciousness of guilt).

- Appellant knew the reason Tanner was killed; when asked, he explained to Uselton: "He molested a little girl," which Uselton took "as an admission that he killed Tanner."[44]

- Uselton overheard Appellant's then-girlfriend ask him why he did "it," and he told her he "had to."[45]

- Uselton's description of the crime scene and other related evidence were corroborated.

  - Uselton told police details about the crime not known to the public, e.g., the disengaged garage door, the covered sliding glass door, Tanner's missing wallet, and gasoline spread around the house.[46]

  - Uselton said he saw Appellant stab Tanner's body in the neck. The medical examiner confirmed this had been done post-mortem.[47]

  - Uselton led police to the garage where they had already found Tanner's abandoned truck.[48]

  - Police found black latex gloves at the scene, as Uselton described.[49]

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[44] 8 RR 54; *Holder*, 595S.W.3d at 696.

[45] 8 RR 26, 64.

[46] 5 RR 58, 101 (police), 142 (Casey James), 5 RR 88-89 (Uselton).

[47] 5 RR 180, 187 (medical examiner); 8 RR 56-58 (Uselton).

[48] 8 RR 26 (police), 33-34 (Uselton led police to garage), 58-60 (Uselton).

[49] 5 RR 63 (police); 8 RR 52-53 (Uselton).

- Appellant's DNA linked him to the crime scene despite his effort to incinerate it.[50]

    - Though Appellant tried to set the crime scene on fire, police found two black latex gloves in Tanner's kitchen that had not there before James left,[51] and DNA testing showed that "it would be extremely unlikely that anyone other than [Appellant] was a major contributor from [the] three glove swabs."[52]

This evidence alone contradicts the court of appeals's holding that the CSLI was "*the* crucial part—of the State's case."[53] Although the CSLI records supported the State's theory that Appellant was in the vicinity at the time of the murder, this was hardly conclusive evidence. It served to show he initially lied about his whereabouts on November 10th, but the jurors watched Appellant's police interview and heard other lies that were far more incriminating. On this record, the CSLI evidence ultimately played a supporting or cumulative role to other, more persuasive evidence that the court of appeals downplayed. Uselton's testimony is a case in point. When considering it in context, all the court of appeals was willing to acknowledge

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[50] *See Nisbett*, 552 S.W.3d at 266 (physical evidence can link a person to a crime).

[51] 8 RR 103-04.

[52] 5 RR 217; *Holder*, 595 S.W.3d at 695.

[53] *Holder*, 2020 WL 7350627, at *7 (emphasis in original).

was that his testimony "certainly suggest[ed] appellant was involved in the crime."[54] In reality, it provided a narrative of Appellant's incriminating actions and words after Tanner's murder that would have convinced the jury, even in absence of the CSLI evidence, that Appellant killed him.

Regardless of the CSLI evidence, for the jury to acquit Appellant, it would have had to believe that Appellant did not kill Tanner but that he took Uselton to the murder scene, knew the reason Tanner was killed, stabbed Tanner post-mortem, threatened Uselton, told his girlfriend not to talk to the police, attempted to clean up and cover up the murder, indicated his personal responsibility to Uselton in various implicit ways, and never told Uselton or the police that someone else was responsible for Tanner's death. Because the erroneous admission of CSLI evidence could not have altered this calculus for the jury, it did not affect Appellant's substantial rights.

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[54] *Id.*

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the court of appeals, find the error harmless, and affirm Appellant's conviction, or, in the alternative, remand to the court of appeals for a harm analysis under the proper standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,876 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of February 2021, the State's Petition for Discretionary Review was served electronically or by electronic mail to Steve Miears, Counsel for Christopher Holder at stevemiears@msn.com.

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney

APPENDIX

Court of Appeals' Opinion

2020 WL 7350627
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish Tex. R. App. P. 47.2(b).
Court of Appeals of Texas, Dallas.

Christopher James HOLDER, Appellant

v.

The STATE of Texas, Appellee

No. 05-15-00818-CR
|
Opinion Filed December 15, 2020

On Appeal from the 416th Judicial District Court, Collin County, Texas, Trial Court Cause No. 416-80782-2013, Chris Oldner, Judge

Attorneys and Law Firms

Steven R. Miears, Attorney at Law, Grapevine, for Appellant.

John R. Rolater Jr., Asst. Criminal District Attorney, Chief of the Appellate Division, Libby Joy Lange, Assistant District Attorney, McKinney, for Appellee.

Before Justices Myers, Whitehill, and Nowell

MEMORANDUM OPINION

Opinion by Justice Myers

***1** A jury convicted appellant Christopher James Holder of capital murder and he appealed the judgment and sentence. He brought thirteen issues challenging the sufficiency of the evidence; the trial court's denial of appellant's motion to suppress his cell phone records; the alleged denial of the right to confrontation; the admission of expert opinion; the trial court's overruling of appellant's objection that the State asked a witness a question that assumed facts not in evidence; the trial court's denial of appellant's motion to suppress his statement to the police; the denial of an accomplice witness jury instruction; and cumulative error. On original submission we affirmed the judgment of conviction. *See Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362 (Tex. App.—Dallas Aug. 19, 2016). The Texas Court of Criminal Appeals granted review. While the case was pending, the United States Supreme Court decided *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018), holding that persons have a reasonable expectation of privacy under the Fourth Amendment in cell site location information and, therefore, a search warrant is required to obtain seven or more days of that information. *Id.* at 2217. The Court of Criminal Appeals reversed this Court, concluding appellant had a reasonable expectation of privacy under Article I, Section 9 of the Texas Constitution in the twenty-three days of his cell cite location information accessed by the State.[1] The case was remanded for us to determine whether appellant was harmed by the erroneous admission of the cell cite location information. *See Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020). Having considered this question, we reverse and remand the judgment of conviction.

[1] The State conceded that the petition seeking appellant's cell site location information did not set forth sufficient facts to establish probable cause, *id.* at 704 n.27, and the State did not claim exigent circumstances or some other recognized law enforcement need. *Id.*

Discussion

The sole issue before us is whether appellant was harmed by the erroneous admission of his cell site location information, but the parties disagree on what standard of harm we should apply.[2] Appellant contends the constitutional harm standard of rule 44.2(a) applies in this case, but that even under the less rigorous harm analysis of rule 44.2(b), the harm is evident. *See* Tex. R. App. P. 44.2(a), (b). The State maintains the error in question is harmless under the rule 44.2(b) non-constitutional harm standard. *See id.* 44.2(b). Accordingly, we turn first to the question of whether we should review for harm under 44.2(a) or 44.2(b).

[2] Because the facts of this case were thoroughly discussed in our previous opinion, we recount them here as necessary to address the question of harm.

In *Love v. State*, 543 S.W.3d 835 (Tex. Crim. App. 2016), which concerned improperly admitted text messages and which, like the present case, dealt with Article I, section 9 of the Texas Constitution, the court held that the text messages should have been suppressed under article 38.23(a) of the Texas Code of Criminal Procedure. *Id.* at 845–46. The court then analyzed the error in question, which it termed constitutional in nature, using the constitutional harm standard of rule 44.2(a). *Id.* at 846; *see also Speers v. State*, No. 05-14-00179-CR, 2016 WL 929223, at *9 (Tex. App.—Dallas Mar. 10, 2016, no pet.) (mem. op., not designated for publication) ("A constitutional error within the meaning of Texas Rule of Appellate Procedure 44.2(a) is an error that directly offends the United States Constitution or the Texas Constitution, without regard to any statute or rule that also might apply."). The court in *Love* ultimately concluded the error was not harmless because it could not determine beyond a reasonable doubt that the text messages did not contribute to the jury's verdict at the guilt-innocence phase. *Love*, 543 S.W.3d at 858.

***2** Over three years later, in *Dixon v. State*, which concerned cell site location information, the majority concluded the court of appeals erred in its harm analysis and that even assuming the admission of the evidence was error under the Fourth Amendment, it was clearly harmless, and the admission of the evidence was harmless beyond a reasonable doubt. *See Dixon v. State*, 595 S.W.3d 216, 218–20 (Tex. Crim. App. 2020). In a concurring opinion, however, Judge Hervey, joined by two other judges, opined that while the court "analyzed the statutory error in *Love* for constitutional harm, we were wrong to do so and should disavow that part of the Court's opinion." *Id.* at 226 (Hervey, J., concurring). The concurring opinion further stated:

> We use a constitutional-harm standard to determine whether a Fourth Amendment violation is harmful because the federal exclusionary [rule] is constitutional in nature, inherent in the Fourth Amendment. *Hernandez v. State*, 60 S.W.3d 106 (Tex. Crim. App. 2001); *see* Tex. R. App. [P.] 44.2(a). Unlike the Fourth Amendment, however, we have held that there is no suppression remedy inherent in Article I, Section 9. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998) (citing *Welchek v. State*, 93 Tex. Crim. 271, 247 S.W. 524 (1922)). Instead, the remedy for an Article I, Section 9 violation is to invoke one of Texas's statutory exclusionary rules.
>
> That brings me to the problem with *Love.* Violations of statutes are reviewed for non-constitutional harm, not constitutional harm. Thus, we erred [in *Love*] when we analyzed the statutory error in that case for constitutional harm. Consequently, we should overrule that part of our opinion at our earliest opportunity. Erroneously assessing harm under the much higher constitutional-harm standard unfairly punishes the State.

Id. (footnotes omitted).

The State similarly points out that the Texas Constitution does not require the exclusion of evidence obtained in violation of article I, section 9, and that article 38.23(a), the Texas exclusionary rule that most suppression claims rely on, is statutory in nature. *See Miles v. State*, 241 S.W.3d 28, 33 (Tex. Crim. App. 2007) (Texas Legislature enacted the Texas exclusionary rule in 1925 in response to *Welchek v. State*, 93 Tex. Crim. 271, 247 S.W. 524 (Tex. Crim. App. 1922), where the Court of Criminal Appeals found no explicit or implicit exclusionary rule in the Texas Constitution); *Hulit v. State*, 982 S.W.2d 431, 437 (Tex.

Crim. App. 1998) ("Article I, Section 9 creates no exclusionary rule similar to that found in Fourth Amendment for federal prosecutions.") (citing *Welchek*). Furthermore, argues the State, the fact that article 38.23 implements the constitutional right to be free of unreasonable searches does not alter this analysis. *See Gray v. State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005) ("[M]any—perhaps most—statutes are designed to help ensure the protection of one constitutional right or another. Having such a purpose does not convert a statutory right into one of federal constitutional dimension, much less a right whose violation is considered to be structural error.").

Thus, according to the State, the non-constitutional harm standard of 44.2(b) applies because the error in question is statutory "under a plain reading of [rule] 44.2." The State acknowledges that *Love* "may implicitly suggest a contrary result," but it suggests that "it does not appear that the Court in *Love* considered the above analysis," and, "[a]t any rate, the analysis advanced above has been expressly discussed and adopted by at least four members of that court." *See Dixon*, 595 S.W.3d at 225 (Hervey, J., concurring); *Hernandez v. State*, 60 S.W.3d 106, 116 (Tex. Crim. App. 2001) (Keller, P.J., dissenting) (stating that "Article 38.23 is a statutory mechanism, not a constitutional one, and any error predicated thereon must be analyzed under the standard of harm for non-constitutional errors.").

***3** As an intermediate appellate court, however, we are required to follow existing precedent, and this of course includes decisions of the Court of Criminal Appeals. Absent a contrary decision from a higher court or an intervening and relevant change in applicable statutory law, we are bound by that precedent. *See, e.g., Merrit v. State*, 529 S.W.3d 549, 554 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) ("As an intermediate appellate court, we lack the authority to overrule an opinion of the Court of Criminal Appeals."); *see also Cervantes-Guervara v. State*, 532 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Sherman v. State*, 12 S.W.3d 489, 494 (Tex. App.—Dallas 1999, no pet.). Moreover, concurring opinions have only persuasive value; they are not binding precedent. *See, e.g., Unkart v. State*, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013) (noting that concurring opinions have only persuasive value); *Schultz v. State*, 923 S.W.2d 1, 3 n.2 (Tex. Crim. App. 1996) ("As a concurring opinion, *Lugo-Lugo* [650 S.W.2d 72, 87 (Tex. Crim. App. 1983) (Clinton, J. concurring)] is not binding precedent."). As the Fort Worth Court of Appeals recently stated:

> Appellant's arguments implicate the violation of a statute—Article 38.23 of the Code of Criminal Procedure; thus, we would normally be inclined to utilize the standard of Rule 44.2(b). But a recent opinion from the Court of Criminal Appeals includes a concurrence that noted that the court's prior precedent appears to require the more strenuous constitutional harm analysis when addressing the failure to exclude evidence under Article 38.23. *See Dixon v. State*, 595 S.W.3d 216, 225–26 (Tex. Crim. App. 2020) (Hervey, J., concurring) (citing *Love v. State*, 543 S.W.3d 835, 845 (Tex. Crim. App. 2016)). Though the concurrence urges the Court of Criminal Appeals to overrule the precedent that analyzed a violation of a statute for constitutional harm, we follow the state of the law as we understand it to be and analyze Appellant's claim based on the alleged violation of Article 38.23 for constitutional harm.

Livingston v. State, No. 02-19-00288-CR, 2020 WL 6165411, at *9 (Tex. App.—Fort Worth Oct. 22, 2020, no pet.) (mem. op., not designated for publication).

We reach a similar conclusion. The Court of Criminal Appeals has held that the acquisition of appellant's cell site location information without probable cause violated privacy protections guaranteed by Article 1, section 9 of the Texas Constitution. And the most recent binding legal authority of which we are aware tells us that our analysis for harm in a situation like this must follow the constitutional harm standard of rule 44.2(a). We now turn to that question.

Under rule 44.2(a), if an error is constitutional in nature, an appellate court must reverse the judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2(a). In applying this "harmless error" test, we inquire whether there is a reasonable possibility the error might have contributed to the conviction or punishment. *Love*, 543 S.W.3d at 846 (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

Our harm analysis should focus as much as possible on the probable effect the evidence had on the jury in light of the existence of other evidence. *Id.* (citing *Wesbrook v. State*, 29 S.W.3d at 119). "We consider such things as the nature of the error, the extent

to which it was emphasized by the State, its probable collateral implications, and the weight a juror would probably place on the error." *Id.* (citing *Snowden v. State*, 353 S.W.3d 815, 821–22 (Tex. Crim. App. 2011)). This list is not exclusive, and the court should review any and every circumstance apparent in the record that logically informs a determination of whether, beyond a reasonable doubt, the particular error contributed to the conviction or punishment. *Id.* (citing *Snowden*, 353 S.W.3d at 822). We are required to evaluate the entire record in a neutral manner "and not 'in the light most favorable to the prosecution.' " *Id.* (quoting *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989) (discussing constitutional harm under former Tex. R. App. P. 81(b)(2))).

***4** Applying these principles, the nature of the constitutional error in this case was the erroneous admission of evidence—appellant's cell site location information. As the Court of Criminal Appeals stated in its opinion, and as we recounted in our previous opinion, call log records showed that the victim in this case, Billy Tanner, "was alive until at least 2:35 p.m. on November 10 [2012] because that is when he ended a phone call with his parents." *Holder*, 595 S.W.3d at 697. "After this call ended, Tanner's phone did not connect to another tower until it was recovered by police." *Id.* at n.10. Furthermore,

> The [call log] records also showed that, between 3:28 p.m. and 4:16 p.m. the same day, Appellant's cell phone connected to the tower that "best served" Tanner's home. (According to the State, this is when Tanner was killed.) By 4:16 p.m., Appellant's cell phone had left the area, but it reentered the area at 12:41 a.m. on November 11. Appellant's phone was pinging in Tanner's coverage area until 12:44 a.m. From 12:44 a.m. to 2:11 a.m., there was no activity on Appellant's phone. At 2:11 a.m., the phone pinged a tower near the parking garage where police found Tanner's abandoned truck.

Id.

There was no forensic evidence from the crime scene—no DNA, blood, fingerprints, or shoe prints—directly connecting appellant to Tanner's murder. However, the State used the cell site location data from appellant's phone to show his phone was "hitting off" of the cellular tower that "best served" Tanner's home on Saturday, November 10, 2012, between 3:28 to 4:16 p.m. This was when the State believed Tanner was murdered (he died from blunt force trauma to the head and multiple stab wounds).

The State also used the cell site data from appellant's phone to show his statements to the police regarding his whereabouts on the afternoon of Saturday, November 10 were inconsistent with his cellular records. For example, appellant gave detectives a timeline of where he had been on November 10, telling them he went to the Irving tattoo shop where he worked, took his girlfriend Vanessa Garcia to work in Irving, went to a birthday party, and then picked Vanessa up from work and went back to her house, where he stayed with her. The following day he went to the movies. The detectives told appellant they had his cellular records, and that this timeline was inconsistent with what those records showed. Appellant eventually told them he had been in the Plano area near Jupiter and Highway 190 trying to buy drugs from a person named "Chris." However, that area was several miles from the crime scene, the two areas were served by different cellular towers, and the cellular records showed appellant's phone was "hitting off" of the cellular tower nearest Tanner's house on Saturday, November 10. Appellant denied being at Tanner's house on November 10, and he said the last time he had been there was when Tanner asked him to move out. Appellant also said he had never driven Tanner's truck.

In addition, the State used the cell site data from appellant's phone to corroborate the testimony of Thomas Uselton, who provided substantial evidence against appellant. Uselton testified that he and appellant visited Tanner's house after the murder and cleaned up the crime scene, among other things. As the Court of Criminal Appeals summarized:

> In January [of 2013], a Tarrant County fire investigator told Plano detectives that an inmate named Thomas Uselton (Uselton) had information about the murder. Uselton told the detectives that he had known Appellant for a few years and that Appellant called him on November 10 around 2:00 p.m. or 3:00 p.m. because he wanted to buy drugs. According to Uselton, Appellant sounded "real hysterical, like real hyper." Uselton said that Appellant called him back later that day and asked him to help with "something" and that he agreed. Appellant rode with his ex-girlfriend to Fort Worth to pick up Uselton. After they picked him up, she drove them to Appellant's tattoo parlor, where Appellant picked up some bleach and black latex gloves, then to Tanner's house. According to Uselton, when they entered Tanner's house, Appellant hugged him and told him that "[h]e's dead. We ain't got to worry about it." Uselton asked who was dead, but then he saw Tanner's body around the corner.

> Appellant said, "[T]hink about [y]our family, bro. You know what it is if you say anything." Uselton asked what Tanner did, and Appellant responded that "He molested a little girl." Uselton understood Appellant's comment as an admission that he killed Tanner. Uselton said that Appellant's ex-girlfriend picked them up at the parking garage in Irving where police found Tanner's abandoned truck. While Appellant and Uselton waited, Uselton "spray[ed] everything down with bleach." When Appellant's ex-girlfriend arrived, they went back to Appellant's tattoo shop. Uselton went to a nearby convenience store to buy some cigarettes and a drink. When he returned, he overheard Appellant's ex-girlfriend ask Appellant in another room, "Why did you do it?" He replied that he "had to."
>
> ***5** Uselton also told police other details about the crime that were not public. For example, he told police that Appellant unplugged the garage-door opener at Tanner's house, that he helped Appellant cover up windows and the sliding glass door with blankets, and that he helped Appellant pour gas around the house.

Id. at 607–98. Although appellant states in his supplemental brief that Uselton was an accomplice, we noted in our previous opinion that the jury charge did not include an accomplice-witness instruction, and we rejected appellant's argument that Uselton was an accomplice as a matter of law. *See Holder*, 2016 WL 4421362, at **23–24.

The evidence further showed that, while they were at the crime scene, appellant suggested to Uselton they "make it look like a robbery." Uselton retrieved a laptop and some other items, and appellant grabbed Tanner's wallet from a dresser drawer. Appellant said, "Let me cut his head off, make sure he's dead," and Uselton replied, "No, dude, I think he's dead, bro. Leave it alone." They walked over to Tanner's body and appellant, holding a butcher knife, leaned over Tanner and stabbed him in the neck with the knife. Later, after they got to the tattoo parlor, Uselton went into the restroom and when he came out, he saw appellant standing in the dark crying.

Plano police found a pair of black latex gloves at the crime scene, on Tanner's kitchen table. During their investigation, Plano detectives learned that appellant was a tattoo artist, and they found a Facebook photo of appellant tattooing someone while wearing a pair of black latex gloves like the ones found in the house. The gloves from the crime scene were submitted for DNA testing, and the DNA analysis determined appellant could not be excluded as a major contributor of the mixed DNA swabs collected from the gloves. The forensic DNA analyst concluded it would be extremely unlikely that anyone other than appellant would be the major contributor of the DNA from the glove swabs.

Before detectives spoke with Uselton, they were aware that Tanner's truck had been stolen and had located it in a Las Colinas parking garage with the help of the Irving Police Department. When the police took Uselton out of jail a few months later to confirm his story by identifying relevant locations, Uselton directed them to the same parking garage in Las Colinas, and he directed them to Tanner's house.

Vanessa Garcia corroborated some of Uselton's testimony. She testified that she and appellant picked up Uselton on the night of Saturday November 10; they drove to a residential neighborhood in Plano; appellant and Uselton got out of the car and she went home; and early the following morning she picked up appellant and Uselton near a parking garage in Las Colinas.

Appellant argues the cell site location data from his phone was the foundation on which the State's case was built, showing his identity as the person responsible for Tanner's death. The State responds that the cell site location information was merely one part of a multi-faceted case, and that when appellant's cell site location data is viewed in the context of the State's entire case, it "would not have substantially swayed the jury." "Instead," argues the State, that evidence "would have simply incrementally improved the jury's reason to believe the State's other evidence." Yet the record shows that the State developed and relied heavily on appellant's cell site location data to prove its case, arguing the cellular records showed appellant's phone was in the area of the crime scene during the time when the State maintained Tanner was murdered, and that appellant lied regarding his whereabouts on Saturday, November 10. As the State told jurors in its opening statement:

> ***6** And Plano P.D., when they got these court ordered cellphone records, they determined that the cell tower next to Bill Tanner's house, that the defendant's phone had hit off of that cellphone tower around 3:10, the closest cellphone tower to Bill's

house, around 3:10 that Saturday. And, of course, Bill Tanner's last phone call, the last anyone heard from him or saw him, was at 1:45 Saturday. So the police know that the defendant's cellphone was hitting off the tower next to Bill Tanner's house.

Then they go talk to the defendant. They talk to him, and they want to get his side of the story. And they ask him, "Where were you on Saturday?" And he gives sort of a spiel about what he was doing. The one thing that he says was that he was not in Plano, because he lived down in Irving. That's where he's from. That's where the tattoo shop was, wasn't anywhere near Plano. So they know, well, your cellphone was. So they ask him, "Did you have your cellphone with you? Maybe somebody else was using it. Maybe somebody borrowed it." Yes, his cellphone was always with him. Next they ask what his number was to confirm. They confirm they have the right phone. They have the right phone number. So they know that doesn't make sense.

So once he says this story, they confront him with it, say, well, what you're telling us doesn't make a lot of sense, because your cellphone was in Plano. He doesn't have a real good explanation, because he's lying. You can see that.

Then the detective plants a suggestion. Well, could it be because maybe you were using methamphetamine, and you were in Plano at the time buying methamphetamine? Ah, yes. Ah, yes. So then he says, yes, I was in Plano, and I was looking to score. However, when asked what part of Plano, he puts himself south, around 190 and Jupiter, which is going to be closer to the Richardson/Plano border than where Mr. Tanner's home was, which is closer to Spring Creek and Parker in east Plano. And you will hear that there's cellphone towers around 190 that are different than the cellphone towers that would hit if they were closer to Bill Tanner's house. And the police officers know that it's still not right. So now they know that the defendant had his phone. They know that his phone is hitting off the cell tower closest to Bill Tanner's house, and Bill—we didn't hear from him after that Saturday around 1:45.

The State continued to emphasize these issues in its closing argument:

Coincidentally, 43 minutes after Bill Tanner makes his last phone call, the defendant shows up near the crime scene. And no, the phone records, they don't say, hey, this person is at a particular address. But what they do tell you, and in this specific instance, they tell you that he's hitting off a very specific tower, and a specific side of that tower, the side of that tower that serves the crime scene's address. The most likely tower and side of tower to serve that address, the best server, as the AT&T engineer, K.D. Burdett testified, that's the server that's going to serve that address. That's the tower that's going to serve it. And remember, you know there's several addresses, there's several places where, you know, we can be multiple towers in a lot of these addresses, or multiple sides of the towers, but not 3121 Royal Oaks [Tanner's Plano, Texas address]. It's this one tower, tower 2397/1151, that one side of the tower.

And that directly discredits the defendant's statements to the police. What did he tell the police? He tells them, I wasn't in Plano. I wasn't in Plano at all. I was in Irving. I was either at Vanessa Garcia's house or at the tattoo shop. I took Vanessa Garcia to work in Lewisville. I went to a birthday party in Irving, pretty much in Irving and picking her up in Lewisville. That's it. What did we do that night? We stayed—just hung out, stayed at her house. We didn't really go anywhere. Gas is expensive. That's what he tells the police. Forgets to mention Plano altogether. Why is that?

***7** And yet these show that he, in fact, was in Plano. When the police confront him with that evidence, say, hey, we've got your phone records, we know you were in Plano, can you tell us why, give us something, we're trying to figure things out because you're not being honest with us, initially he can't think of anything. "I don't know. I wasn't in Plano." He maintains that.

And then eventually he comes up with a different story. Well, you know, I did go to Plano. I did go to Plano, and it was to buy drugs, and it was from this guy, and I went over in the Jupiter/190 area, Jupiter/George Bush area. That's where this guy lives. And I bought some drugs. I didn't want to get him in trouble. Okay?

Looking at this map, you can tell Jupiter/190 area, where it is. It's nowhere near where the crime scene is, nowhere near where the crime scene tower is. So that story just didn't fly. It doesn't check out. It doesn't match with the evidence. But that's the defendant's story, because he's got to come up with something.

> What else do the phone records show you? Well, they show you that that night the defendant travels to Fort Worth, again contrary to his story of, "We stayed at home," travels to Fort Worth, and he picks up Thomas Uselton, something that again corroborates Thomas Uselton's story, something that corroborates Vanessa Garcia's story. "Yeah, we went to Fort Worth." Defendant conveniently leaves that out when he's talking to the police. And again, we can see exactly the phone tower that he hits off of when he gets to Fort Worth, and it's the one that services that Kroger where Thomas Uselton says he was waiting off of Camp Bowie.
>
> What happens after that? Well, he travels back to Irving. Thomas Uselton says, "Hey, we went to Irving, we stopped off at the tattoo shop, he got some cleaning supplies, got some gloves." All consistent with the evidence and consistent with the phone records, as he pings off a tower, the tower that serves—one of the towers that serves the tattoo shop at 11:49 p.m.
>
> And then on to the crime scene, from 12:41 to 12:44 a.m. Now, you don't have a lot of activity on the phone at this time, because it goes off after 12:44 a.m. There's no activity. Nothing is registering on a tower. Again, consistent with the phone being turned off.

Later, toward the end of its closing argument, the State told jurors their task was akin to assembling the pieces of a puzzle:

> As the State, we have to prove the case to you beyond a reasonable doubt. It's not beyond all doubt. It's not beyond a shadow of a doubt. It's beyond a reasonable doubt. And in this particular case, and it's like [the State] pointed out to you in jury selection, we have those pieces of the puzzle, those different pieces of evidence. When you look at them, and you analyze them alone, they're insignificant. They mean something. It could be a number of different things. But when you start putting the pieces together, adding them up, they start to show you something. They start to give you a clearer picture. And you may not have the full picture. There's going to be holes. We talked about that. We discussed that. But when you look at all the evidence together, it becomes clearer what happened in this case. It becomes clearer that the defendant murdered Bill Tanner.

The State's puzzle analogy illustrates that there was other evidence of guilt in this case apart from the cell site location data, such as Uselton's testimony and the evidence corroborating it. It is also true, as the State points out in its supplemental brief, that " '[a] defendant's conduct after the commission of a crime which indicates a 'consciousness of guilt' is admissible to prove that he committed the offense.' " *Hedrick v. State*, 473 S.W.3d 824, 830 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (quoting *Ross v. State*, 154 S.W.3d 804, 812 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd)); *see also Eadha v. State*, No. 05-17-01296-CR, 2019 WL 3423278, at *3 (Tex. App.—Dallas July 30, 2019, no pet.) (not designated for publication). Likewise, concealing incriminating evidence is probative of wrongful conduct and a circumstance of guilt. *See Guevara v. State*, 152 S.W.3d 45, 49–50 (Tex. Crim. App. 2004); *see also Nisbett v. State*, 552 S.W.3d 244, 267 (Tex. Crim. App. 2018). But to say that appellant's cell site location information only *incrementally* improved the jury's reason to believe the State's other evidence goes a bridge too far. Uselton's testimony, for example, certainly suggests appellant was involved in the crime; however, appellant's cell site location information was a crucial part—if not *the* crucial part—of the State's case. This evidence showed appellant was in the area of the crime scene during the time when Tanner was supposed to have been murdered, and that appellant lied regarding his whereabouts on that day. Without appellant's cell site location information, in other words, a major piece of the puzzle is missing. Therefore, after reviewing the record as a whole, we conclude the probable impact of the improperly admitted cell site location information was great. And because we cannot determine beyond a reasonable doubt that the cell site location information did not contribute to the jury's verdict, the error was not harmless. *See* Tex. R. App. P. 44.2(a).

***8** Accordingly, we reverse the judgment of conviction and remand this case for further proceedings.

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